murder which demonstrated that they were unanimous in their determination that Van Poyck was guilty of felony murder.

Third, during the penalty phase, the State did not base its argument for a death recommendation on the theory that Van Poyck was the shooter. For instance, prior to commencement of the penalty phase, the trial court, with the agreement of the parties, confirmed that emphasis would not be placed upon either first-degree murder theory. The trial judge inquired: "Does everybody then agree as to, [the instruction] 'Ladies and gentlemen of the jury, you have found the Defendant guilty of first degree murder,' and I leave it at that?" (ROA 3183; SR 692). Defense counsel agreed. (Id.). As is clear from the penalty phase record, the State sought and discussed the four statutory aggravating factors,[4] and the State never relied upon the triggerman theory for imposition of a death sentence. Rather, the State told the jury to assume that Valdes was the triggerman. (ROA 3511-12; SR 766-767). It was the defense that argued Van Poyck's participation was minor and that he was not the triggerman, and to this, the State commented on Van Poyck's major role in the crime and noted in passing the triggerman theory, but he never stated that this was proven beyond a reasonable doubt. (ROA 3477-3540, 3562-65; SR 795, 817-820).

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[4] Those factors are: (1) crime committed while Van Poyck was on parole; (2) crime was committed for purpose of effecting an escape from custody; (3) great risk of death to many persons, and (4) prior violent felony. (ROA 3482-3500, 3507-08). See Van Poyck v. State, 564 So.2d 1066, 1068-69, 1071 (Fla. 1990) (affirming aggravating factors found by trial court).

REASONS FOR DENYING THE WRIT

QUESTION I

CERTIORARI REVIEW IS NOT WARRANTED AS THE STATE COURT'S DETERMINATION WAS PREMISED STRICTLY ON APPLICATION OF A STATE RULE OF PROCEDURE WHICH DOES NOT PRESENT A FEDERAL QUESTION NOR DOES IT CONFLICT WITH ANY OTHER FEDERAL OR STATE CASE OPINION AND THE FLORIDA SUPREME COURT'S FACTUAL FINDINGS ARE SUPPORTED BY THE RECORD

(Claims I and II Restated)

Petitioner claims that certiorari review is warranted in the instant case because allegedly the Florida Supreme Court has created a *per se* rule depriving him of potential exculpatory evidence which would reduce his capital sentence to life. Specifically, Van Poyck asserts that the state courts' opinion violates his due process rights because it affirms the trial court's summary denial of his request for DNA testing. The State asserts that in essence Van Poyck is requesting federal review of a state courts' application of a state discovery rule which is not a proper basis for certiorari review. Moreover, the issue turns on the specific facts of the case which are not of any importance beyond the litigants of this case and do not present any conflict or expose a question of unsettled federal law.

Despite the constitutional pretensions of this claim, Van Poyck has not established constitutional error. There is no question that a defendant does not have a constitutional right to DNA testing, or for that matter any discovery. Petitioner

concedes that point. **See petition 14.** See Weatherford v. Bursey, 429 U.S. 545 (1977) (rejecting argument that Brady created a constitutional right to discovery in criminal cases); see also Wardius v. Oregon, 412 U.S. 470, 474 (1973) ("the Due Process Clause has little to say regarding the amount of discovery which parties must be afforded..."); Arizona v. Youngblood, 488 U.S. 51, 58-59 (1988) (finding no constitutional requirement that mandates State to conduct any testing even if such testing might exculpate a defendant). All that Van Poyck has done is demonstrated that he is dissatisfied with the Florida Supreme Court's denial of relief on this claim, but that does not create a constitutional issue. Review must be denied. Barclay v. Florida, 463 U.S. 939, 957-58 (1983) (plurality opinion) (stating "mere errors of state law are not the concern of this Court, Gryger v. Burke, 334 U.S. 728, 731, 68 S.Ct. 1256, 1257, 92 L.Ed. 1683 (1948), unless they rise for some other reason to the level of a denial of rights protected by the United States Constitution.").

Moreover, this claim turns completely on its specific facts, which are of no interest to anyone other than the parties to this litigation, and which are of insufficient importance to justify granting the writ. See Bartlett v. Stephenson , 535 U.S. 1301, 1304 (2002) (issues with few, if any, ramifications beyond the presenting case do not satisfy any of the criteria for exercise of certiorari jurisdiction). In fact the entire factual premise of this claim is based solely on whether a state court judge correctly found that Van Poyck did not satisfy one of the basic requirements of the rule, i.e., under the facts of this case, there is no reasonable probability that DNA testing would change Van Poyck's sentence. Because the petition presents nothing more than the application of state discovery rules and has little significance except for the" parties to this litigation, review must be denied. Rockford Life Insurance Co. v. Illinois Department of Revenue, 482 U.S. 182, 184, n. 3 (1987); Butz v. Glover Livestock Commission C., 411 U.S. 182 (1973) (dissenting

opinion); Powell v. Nevada 511 U.S. 79, 86-7 (1994) (Thomas, J., dissenting); Chevron U.S.A., Inc. v. Sheffield , 471 U.S. 1140 (1985) (Stevens, J., on denial of certiorari); Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 79 (1955); see also, Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387 (1923) ("... it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles, the settlement of which is of importance to the public as distinguished from the parties ....").

A review of how the issue was presented and resolved in state court will further demonstrate that this case neither presents a federal question nor exposes a conflict that must be resolved by this Court. Pursuant to Fla.R.Crim.P. 3.853, Van Poyck sought DNA testing of the clothes that he and his co-defendant, Frank Valdes, were wearing at the time Officer Griffis was murdered. Van Poyck argued that DNA testing would "conclusively prove" that it was Valdes, who actually shot Officer Griffis. The trial court summarily denied the request finding,

> pursuant to exhibits contained in the court file which are incorporated herein as reference that there is no reasonable possibility that any DNA testing will result in exoneration or in a mitigated sentence.

Van Poyck v. State, 908 So.2d 326, 328 (Fla. 2005). Petitioner appealed. The Florida Supreme Court summarized the issue as follows,

> The issue before the Court is whether DNA evidence establishing that Van Poyck was not the triggerman creates a reasonable probability that Van Poyck would have received a lesser sentence.

Id. The Court upheld the trial court's summary denial based on three factors. First, the state supreme court found,

> During the penalty phase, the State argued in closing that the evidence supported a finding that Van Poyck was the triggerman, but even if the jurors were to find otherwise, they could still recommend the death penalty if they concluded that Van Poyck played a major role in the felony murder and that he acted with reckless indifference to human life.

Id.

Second, the Court noted,

> Similarly, the trial court did not rely on Van Poyck's triggerman status in imposing the death penalty. The trial court found that the death penalty was an appropriate sentence because the mitigating evidence presented was insufficient to outweigh the aggravating circumstances. See Van Poyck I, 564 So.2d at 1068-69. None of the aggravating circumstances found by the trial court were based on Van Poyck's triggerman status.
>
> In fact, the only indication that the trial court even considered Van Poyck's triggerman status is a passage in the trial court's order in which the court stated that the "State clearly presented competent and substantial evidence as to the crime of first degree felony murder and or first degree premeditated murder and in reality presented competent evidence that Mr. Van Poyck may have in fact been the individual who pulled the trigger and shot Fred Griffis."

(Emphasis supplied.) This statement demonstrates only that the trial court was uncertain whether Van Poyck shot and killed Officer Griffis, rather than a conclusion that Van Poyck was the triggerman. Despite this uncertainty, the trial court found that "by all evidence Mr. Van Poyck was a major participant" in the felony murder.

Id.

And third, the Florida Supreme Court noted,

Further, this Court did not rely on Van Poyck's triggerman status in affirming his death sentence on direct appeal. This Court stated that "although the record does not establish that Van Poyck was the triggerman, it does establish that he was the instigator and the primary participant in this crime." Van Poyck I, 564 So.2d at 1070. The Court concluded that the death sentence was a proportional punishment "since there is no question that Van Poyck played the major role in this felony murder and that he knew lethal force could be used." Id. at 1070-71. In reaching this conclusion, we observed that the death penalty is appropriate even when the defendant is not the triggerman if the defendant is a major participant in the felony and acted with reckless indifference to human life. See id. at 1070. Evidence establishing that Van Poyck was not the triggerman would not change the fact that he played a major role in the felony murder and that he acted with reckless indifference to human life.

> For the foregoing reasons, we hold that there is no reasonable probability that Van Poyck would have received a lesser sentence had DNA evidence establishing that he was not the triggerman been presented at trial. We do not hold, as Justice Anstead asserts, that it makes no difference in the capital sentencing process which of two codefendants actually committed the killing. Rather, we determine only that under the circumstances of this case involving a murder of a prison guard in a brutal armed attack planned by Van Poyck and carried out with Valdes, DNA evidence indicating that Van Poyck was not the triggerman would not have created a reasonable probability of a lesser sentence, which is the standard for ordering DNA testing under rule 3.853(c)(5)(C). Accordingly, we affirm the circuit court's order summarily denying Van Poyck's motion for postconviction DNA testing.

Id. (emphasis added).

In this petition, Van Poyck attempts to distort the findings of the state supreme court. Van Poyck decries that, "[t]he new rule articulated by the Florida Supreme Court-evidence that a capital defendant was not the triggerman is legally irrelevant in determining the appropriateness of a death sentence-is in clear conflict with prior holdings of this Court and violates any number of basic constitutional principles repeatedly reaffirmed by this Court." **Petition at 20-21.** Van Poyck's argument is incorrect.

The gravamen of the state supreme court's holding was that petitioner's request for DNA testing under 3.353 was denied properly because he failed to meet the materiality requirements of 3.353(c)(5). The court's finding that there was "no reasonable

probability" that he would have received a different sentence, does not equate to a finding that the evidence was irrelevant. The court explained that because Van Poyck's sentence of death was not predicated on an erroneous assumption that he was the triggerman, any evidence in support of his non-triggerman status would not have resulted in a life sentence. This standard of "reasonable probability" is not new as it is akin to the well known materiality standard of Brady v. Maryland, 373 U.S. 83 (1963), as well as the very familiar prejudice prong standard of Strickland v. Washington, 466 U.S. 668, 691-692 (1984).[5] Clearly the "reasonable probability" standards applicable therein do not equate to a finding by courts that the evidence "previously withheld by the state" or "the evidence that ineffective counsel did not present" was *per se* irrelevant, simply because a court finds that the prejudice prong of Strickland or the materiality prong of Brady had not been met.[6]

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[5] See Kathy Swedlow, Don't Believe Everything you read: A Review of Modern "Post Conviction" DNA Testing Statutes, 38 Cal.W.L. Rev. 355 (Spring 2002).

[6] Every state to enact a DNA discovery rule, includes as a prerequisite to testing that the results be "material" to the conviction or sentence. See Ariz. Rev. Stat. 13-4240(B)(2003); Ark Code Ann. 16-112-125(c)(1)(B); Cal. Penal. Code 1405(c)(1)(B) (2003); Conn. Public Act No. 03-242, Section 7; Del. Code Ann. title 11, 4504(a)(5)(2001); D.C. Code Ann. 4033(d)(2001); O.C.G.A. §5-5-41 (c) (3) (D).; Idaho Code, 19-4902(d)(1) (2002); Ill. Comp. Stat. 5/116-3(c)(1)(2002); Ind. Code §35-38-7-8; Maine Rev. Stat. Ann. 15, 2138 (4)(A) (2002); Md. Code Ann., Crim. Proc. §8-201(c) (2001 & 2003 Cum. Supp.); Mich. Comp. Laws 770.16 (3)9a) (2002); Minn. Stat., 590.01.1a(c)(2); Mo. Rev. Stat. 547.035(2)(5)(2003); Neb. Rev. Stat. 29-4120(5) (2001); N.Y. Crim. Pro. Law 440.30(1-a); N.C. Gen. Stat. 15A-269(b)(2)(2003); N.M. Stat. Ann. 31-1A-1(D)(1) (2001); N.J. Stat. Ann. 2A:84A-32a(d)(4) (2002); Tenn. Code Ann. 40-30-404 (2003); Tex. Code Crim. Proc. Ann. art. 64.01 (Vernon Supp. 2002; Utah Code Ann. 78-35a-301(2)(e) (2001); Va. Code Ann. 19.2-

As noted previously in the Statement of Case and Facts, the Eleventh Circuit has previously assessed petitioner's claim that forensic evidence demonstrating that he was not the triggerman was critical to his quest for a life sentence. The court did so under a legal theory that is different than the one posited in this petition. However, the factual findings are identical to the state supreme court's opinion detailed above. In a federal habeas petition, Van Poyck claimed that his counsel was ineffective for failing to uncover and present evidence to show that he was not the triggerman. The Eleventh Circuit determined,

> Petitioner argues that Counsel's performance was constitutionally defective because he failed to present evidence that Petitioner was not the triggerman. He identifies two such pieces of evidence: that Valdes had blood on his clothes matching Officer Griffis's blood type, but that Petitioner did not; and that the murder weapon had been purchased by Valdes's girlfriend and that Valdes had been in possession of the gun when he and Petitioner left to commit the crime.
>
> ...We--in this instance--do not discuss the performance element of ineffective assistance of counsel because we conclude that the Florida Supreme Court could have reasonably concluded that no prejudice had been shown. A review of the penalty phase transcripts convinces us that Petitioner cannot establish that he was prejudiced by Counsel's failure to introduce this evidence. During the penalty phase, the witnesses called by the prosecutor only testified about Van Poyck's past crimes and about the fact that he was on

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327.1(a)(m)(2003); Wis. Stat. §974.07(7)(a).

parole when the instant offense was committed. The prosecutor did not present additional evidence suggesting that Petitioner was the triggerman.

Even more telling is the prosecutor's closing argument. Petitioner's being the triggerman played only a very minor role in the prosecutor's argument. As aggravating factors, the prosecutor advanced these things: 1) that Petitioner was on parole when the crime was committed; 2) that the crime was committed for the purposes of effectuating an escape from prison; 3) that Petitioner knowingly created a great risk of death to many persons; and 4) that Petitioner had previously been convicted of a violent felony. The establishment of these elements did not require arguing that Petitioner was the triggerman. The prosecutor never argued that it had been established beyond a reasonable doubt that Petitioner was the triggerman.

The only time the prosecutor did argue that the evidence tended to show that Petitioner was the triggerman was in rebutting Petitioner's argument that he was only an accomplice and played only a minor role in the crime.[8] Even in rebutting that argument, however, the prosecutor relied heavily on the idea that, "[r]egardless of who the triggerman is," death would still be appropriate. Rather than focusing the jury on who the triggerman was, the prosecutor stressed that Petitioner could not be considered a minor participant because he had been the one to come up with the idea of breaking O'Brien out of custody and had planned the crime. While the

prosecutor did, on a few occasions in his closing argument, say that evidence in the case suggested that Petitioner was the triggerman, the main argument made by the prosecutor was that the death penalty--because of the four aggravating factors and because Petitioner was not a minor participant in the underlying violent felony--was an appropriate sentence for Petitioner, regardless of who actually shot Officer Griffis.

Especially because the prosecutor's main argument was that the death penalty was appropriate regardless of who the triggerman was, we see no reasonable probability that, if Counsel had presented the additional evidence that Petitioner was not the triggerman, the outcome of the sentencing phase would have been different. The Florida Supreme Court could reasonably conclude that no prejudice existed. The Florida Supreme Court did reasonably conclude that the triggerman-evidence claim entitled Petitioner to no relief.

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[8] Florida law provides that a mitigating circumstance exists where "[t]he defendant was an accomplice in the capital felony committed by another person and his or her participation was relatively minor." Fla. Stat. Ann. §921.141(6)(d).

Van Poyck v. Moore, 290 F.3d 1318, 1325-26 (11th Cir. 2002), *cert. denied*, 537 U.S. 1105 (2003) (emphasis supplied).

The legal analysis employed by the state supreme court in the opinion under review herein is very consistent with the

Eleventh Circuit's analysis under Strickland. Because petitioner's sentence of death was not predicated on an erroneous assumption that Van Poyck was the triggerman, any evidence in support of his non-triggerman status would not have changed the result of the sentencing proceeding. Clearly this is not a finding that "triggerman" status is irrelevant as Van Poyck claims. The state supreme court's ruling did not deprive him of any constitutional right.

In conclusion, the unassailed facts depicting Van Poyck's role as the major participant in the escape attempt of his friend was, and remains, the basis for his death sentence. Those facts include the following: as admitted to by Van Poyck when he testified at trial, he wanted to help his friend, James O'Brien escape from prison, and he, and he alone, had been contemplating this for approximately two years (ROA 2619-22; SR 443-446). Van Poyck put the escape plan together, recruited Valdes to assist, and gave Valdes orders about how to proceed. (ROA 2622, 2626-27, 2630-31; SR 446, 450-451, 454-455). While Valdes provided the guns, Van Poyck verified they were loaded. (ROA 2628, 2656-57; SR 452, 480-481). The plan was for Valdes to secure the correction van driver and Van Poyck would get the officer who was in the passenger seat (ROA 2647; SR 473).

Following Officer Griffis' murder, Van Poyck turned to Officer Turner and demanded the key to the van and threatened his life (ROA 2649-50; 473-474). Van Poyck admitted telling the passenger, Officer Turner, to get under the van or he was a dead man (RAO 2648; SR 474). Officer Steven Turner testified that Van Poyck pointed a gun at his head told him he was a dead man and pulled the trigger. (ROA 1706-1708). Turner heard a

click as the gun misfired and he was then able to run away.[7] (Id.) Van Poyck also noted that Valdes went through Officer Griffis' pockets after he was shot and that there was blood around (ROA 2650; SR 474). Van Poyck admitted that he was not under the influence of any substance that might have impaired his ability to think or reason - Van Poyck knew exactly what he was doing on the day of the murder. He was not impaired by any mental infirmity (ROA 2629-31, 2639; 453-455, 463). He also reiterated that he set up the entire criminal plan which resulted in Officer Griffis' death. (ROA 2662; SR 486).

The State relied on this evidence at the penalty phase to argue that appellant deserved a death sentence. The trial court relied on this evidence to sentence Van Poyck to death and the Florida Supreme Court relied on same to uphold this sentence of death. The courts' findings are more than supported by the record. There is no federal question to be reviewed. Certiorari must be denied.

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[7] Van Poyck was also convicted of the attempted murder of Turner.

CONCLUSION

Based on the foregoing arguments and authorities, Respondent respectfully requests that this Honorable Court deny Petitioner's request for certiorari review.

Respectfully submitted,

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No. 05-751

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2005

CAPITAL CASE

WILLIAM VAN POYCK,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

PETITIONER'S REPLY TO BRIEF FOR RESPONDENT IN OPPOSITION

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ARGUMENT

Reduced to its essence, the State's response to Van Poyck's Petition for Writ of Certiorari consists of two arguments typically made against such petitions: the petition does not raise a federal issue and would entail only fact bound error correction. Van Poyck's reply can be brief.

The first argument depends on the State's mischaracterization of Florida's DNA statute as a "discovery rule." In fact, Florida has enacted a substantive statutory right to defendants to obtain DNA testing in order to obtain exoneration or mitigation of their sentences. Nothing of the sort was at issue in the State's cited cases. *Arizona v. Youngblood*, 488 U.S. 51 (1988) simply created a rule requiring good faith on the part of the authorities to preserve evidence. *Barclay v. Florida*, 463 U.S. 939 (1983) establishes that state trial court error in considering evidence as a matter of state law does not necessarily warrant reversal on constitutional grounds. *Wardius v. Oregon*, 412 U.S. 470 (1973), if anything, supports Van Poyck's position; in that case this Court applied notions of "fundamental fairness" in holding an Oregon statute requiring the divulgence of alibi information without reciprocal obligations on the part of the state to be unconstitutional.

Certainly none of these cases refutes the notion that Van Poyck is entitled to a meaningful opportunity to avail himself of a state-created right. Whatever label one wants to put on it, Florida's DNA statute extends a specific right that bears directly on a criminal defendant's interest in life and liberty, meaning it cannot be extinguished without comporting with due process. This is a constitutional issue, as previously described. Pet'n p. 16-20. And it is an important one, worthy of this Court's attention, particularly given the pervasiveness of DNA statutes; the potential DNA testing offers in achieving justice in

criminal cases; and its uncertain status in this Court's death penalty jurisprudence.[1]

With respect to the State's second argument – its repeatedly made suggestion that this case involves issues important only to "the parties to this litigation" (Resp. p. 8) – there is a very clear constitutional principle at stake here, that is not in any way bound up with the particular facts of this case: whether it comports with due process to legally presume that a jury that wrongly found a defendant guilty of premeditated murder would have reached the same result knowing the true facts surrounding the defendant's more limited participation in the homicide. Essentially, the courts below, and the state in its response, have said that it is sufficient that some hypothetical jury *could have* found the death penalty the appropriate sentence if Van Poyck did not actually kill the victim. But what some hypothetical jury "could have" done is not what the jury did in this case. We know from the verdict form that as many as 11 members of this jury did believe that Van Poyck was the triggerman (Petitioner's Appendix F-1); consequently, all of the litany of facts set forth by the prosecutor in his closing argument as to why death was appropriate even if Van Poyck was not the triggerman were largely irrelevant to its sentencing determination. Quite simply, the jury rejected Van Poyck's testimony, given without the benefit of forensic evidence, that he was not the triggerman. Van Poyck has thus never had a jury finding that death was the appropriate sentence as a non-triggerman defendant because this jury (or at least as many as 11 of its members) found that Van Poyck was the triggerman.

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[1] Contrary to the State's response (Resp. p. 7-8), Van Poyck does not "concede" that there is no constitutional right to DNA testing. In fact, Van Poyck's petition notes that there may well be such a right, but that that issue need not be addressed in this case since Florida has extended such a right by statute. (Pet'n p. 14). Nonetheless, if the State's apparent position that extinguishment of a state-created right to DNA testing cannot implicate constitutional due process was somehow deemed correct, then the issue of a constitutional right to DNA testing would, in fact, be squarely before the Court.

In that sense, in assessing reasonable probability, the courts below have treated this issue almost as if Van Poyck has had no jury trial at all. The appellate courts have essentially decided the appropriateness of his sentence *de novo*, akin to a directed verdict. There are no unique facts driving that legal decision – it is a fundamental flaw in logic, one that presumably would apply in all non-triggerman cases. Henceforth, whenever a defendant is found to be the triggerman over his protestations that he was not, evidence proving him right (and the State wrong) would not be relevant so long as the subsequent court hearing a motion for DNA testing concludes on its own that some hypothetical jury would have issued a death sentence anyway.

The extinguishment of Van Poyck's (or any defendant's) rights in such a manner does not comport with due process. The DNA statute at issue provides Van Poyck the opportunity to develop and present mitigating DNA evidence, so long as there is a threshold showing that it would have a "reasonable probability" to be mitigating. The State does not, and credibly cannot, argue that there is no reasonable probability that a defendant's non-triggerman status is not mitigating. Indeed, in reading the Florida Supreme Court's decision, there is a very real sense that a special rule is being carved out due to the victim's status as a prison guard. Petitioner's Appendix A-9 (relying on "circumstances of this case involving a murder of a prison guard in a brutal armed attack planned by Van Poyck"). This kind of *ad hoc*, results-oriented reasoning is precisely what the Constitution is designed to prevent.

The rule posited by the State – that a death row defendant found guilty of premeditated murder is not entitled to mitigating DNA evidence if the facts sufficiently demonstrate death eligibility under non-triggerman status – flies in the face of the decisions from this Court and others, in which a defendant's non-triggerman status was deemed relevant as potential mitigation as a matter of course. That case law was previously described and will not be repeated here. It should be

noted, however, that this Court's recent decision in *Bradshaw v. Stumpf*, ___ U.S. ___, 125 S. Ct. 2398 (2005) a case cited in the Petition, but nonetheless ignored by the State, completely undermines the State's position. In *Bradshaw*, the evidence showing the egregiousness of the defendant's conduct was at least as strong in that case as the facts brought forth by the State here. The defendant, Stumpf, had intentionally broken into the home of the victim with an accomplice, shot one family member in the head, twice, though not fatally, and then lied to police about his involvement, until he learned that the family member he shot had survived. Despite these facts, this Court noted the importance of the triggerman issue and remanded the case for further proceedings, including the possibility of a new penalty phase due to the prosecutor's improper attempt to prove that both defendants were the triggerman. Certainly, the State's no prejudice analysis would have been at least as applicable in *Bradshaw* as it is being argued for here. Nonetheless, in remanding, this Court noted that a possible due process violation occurred because "it is at least arguable that the sentencing panel's conclusion about Stumpf's principal role in the offense was material to its sentencing determination." *Id.*, 125 S. Ct. at 2407-08.

It is impossible to conclude on this record that the jury properly considered and accepted the State's argument as to why the death penalty was the appropriate sentence for Van Poyck as a non-triggerman defendant, since that same jury had already found that he was the triggerman. That alone warrants acceptance of the petition, or a summary remand. Still, it must also be noted that even the State's "he should get the death penalty anyway" argument would be subject to serious challenge in connection with any remand and new sentencing proceeding. Mitigating DNA evidence would fully support Van Poyck's testimony that he was "stunned" by the killing of the prison guard; that half of him wanted to leave immediately; and that he wasn't thinking clearly except he knew he still needed the keys to open the van to free his friend. RA 2588-89. DNA evidence showing that Van Poyck was not the shooter would also completely undermine the testimony of the surviving

prison guard that Van Poyck pointed the murder weapon at him and pulled the trigger.

In any new sentencing hearing, that mitigating DNA evidence would be coupled with the evidence that Van Poyck has compiled since that time, including the "vast array of mitigating circumstances" previously identified by the three dissenters at *Van Poyck v. State*, 694 So.2d 686, 700 (Fla. 1997) (Anstead, J. dissenting), as well as subsequent testimony of Turner at the trial of James O'Brien, and a forensics expert at Van Poyck's post-conviction hearing demonstrating that Turner's version of events concerning Van Poyck's alleged attempt on his life was not credible.[2]

Finally, this Court's recent decision in *Brown v. Sanders*, 126 S. Ct 884 (January 11, 2006), which was handed down after Van Poyck filed the initial petition in this Court further reinforces the inherent unreliability of Van Poyck's death sentence. Van Poyck's jury found him to be death eligible in the first instance and then sentenced him to death after finding the existence of a statutory "death eligibility factor" (that he was guilty of first degree premeditated murder) which was later specifically invalidated on direct appeal by the Supreme Court of Florida. To date, no court has applied a constitutional harmless error analysis to this unreliably rendered death sentence nor has any court reweighed the mix of aggravating circumstances against the totality of all of the mitigating evidence.

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[2] At James O'Brien's trial months later, Turner testified that the chamber of the weapon in Van Poyck's hand was open. Forensic evidence at Van Poyck's post-conviction hearing has established that a gun cannot be fired in such a circumstance and, in fact, is designed to inform the shooter that it is empty. Post-conviction Transcript p. 322. This would have bolstered Van Poyck's testimony that he knew his gun was empty because the slide had come back, and that he did not pull the trigger. RA 2599, 2602.

The State's response, with its list of hypothetical factors which the jury and judge could have considered in deciding to ultimately sentence Van Poyck to death, had they not believed him to be the triggerman, only serves to reinforce the uncertainty and unreliability underlying this death sentence. There is no need to keep guessing and hypothesizing about whether Van Poyck would have been sentenced to death had his jury known all of the true facts and circumstances surrounding the crime. Rather, by the simple expediency of remanding for DNA testing and a new penalty phase, all uncertainty can, and under any principled constitutional analysis should, be eliminated. *Accord Deck v. Missouri*, ___ U.S. ___, 125 S. Ct. 2007, 2014 (2005) ("the Court has stressed the 'acute need' for reliable decision making when the death penalty is at issue").

CONCLUSION

For the foregoing reasons, Van Poyck respectfully reiterates his request that this Honorable Court grant his petition for a writ of certiorari.

Submitted this 27th day of February, 2006.

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